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CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOHN REYES, Defendant and Appellant.	C052592 (Super. Ct. No. 04F07954)

APPEAL from a judgment of the Superior Court of Sacramento County, Alan G. Perkins, Judge. Affirmed.

Peter Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Janis Shank McLean, Supervising Deputy Attorney General, Daniel B. Bernstein, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of Parts I and III of the Discussion.

A jury convicted defendant John Reyes of possession of methamphetamine for sale (Health & Saf. Code, § 11378), transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)), possession of marijuana while driving a motor vehicle (Veh. Code, § 23222, subd. (b)) and driving on a suspended license (Veh. Code, § 14601.1, subd. (a)). The trial court placed defendant on probation for five years.

On appeal, defendant contends that (1) evidence relating to domestic violence should have been excluded or admitted only for limited purposes, (2) three Judicial Council of California Criminal Jury Instructions (CALCRIM) misstate the law, and (3) the judgment must be corrected to reflect the authorized amount of one fine. None of these claims has merit, and we therefore affirm the judgment.

FACTS AND PROCEEDINGS

Defendant borrowed a car from a friend at 8:00 p.m. At approximately 1:00 a.m., a police officer saw the car make an unsafe turn. As the officer followed the car, he ran a vehicle check and learned that the registration had expired. He stopped the car.

Defendant, who was the driver and sole occupant of the car, had a suspended driver's license. The officer called a towing company to impound the car, and he searched the vehicle. The officer saw a glass smoking pipe in plain view between the front passenger seat and the center console. A baggie underneath the pipe contained methamphetamine. On the front passenger's seat,

underneath a white plastic bag containing groceries, was a baggie of marijuana and a bindle of marijuana. A second pipe was found in a gym bag behind the driver's seat.

Defendant denied that the drugs were his but told the officer that he "had a problem using marijuana and dope." He said he had borrowed the car from a friend but also said "that since he was the only occupant in the vehicle, that he guessed he had to take responsibility for it."

The methamphetamine had a net weight of nearly 27 grams and a street value of between $580 and $780. A narcotics expert opined that the methamphetamine was possessed for sale. He also testified that methamphetamine dealers or users would not have left their drugs for someone else to find because they treat their drugs as a "prize possession."

Defendant was charged with possession of methamphetamine for sale, transportation of methamphetamine, possession of marijuana while driving a car, and driving on a suspended license.

Defendant's ex-wife, E.T., testified on his behalf. Although the couple was divorced, they still lived together and were romantically involved. She testified that defendant had been on his way to help her with a medical emergency when he was stopped by the police. E.T. had never mentioned this before, even to defense attorneys. She said that she had never seen defendant use or possess methamphetamine, and she added that defendant had no money to purchase drugs in this quantity.

During cross-examination, E.T. said she was not afraid of defendant. The prosecutor then questioned her about several incidents of domestic violence in which defendant assaulted E.T. E.T. reiterated that she was not afraid of defendant, commenting, "I know that [defendant] loves me and I love him, and there are stressful moments in time and everybody has to deal with those kinds of things."

As the prosecutor argued to the jury, the critical issue in this case was whether defendant knew the drugs were in the car. Defendant denied any knowledge of the drugs and asserted he had borrowed the car to help his wife. The prosecutor noted that defendant had the car for at least five hours before he was stopped. She questioned E.T.'s credibility, asserting that E.T. was both biased in favor of defendant and afraid of him. She pointed out that E.T. had offered a version of events she had never given before, and that her story did not jibe with other evidence. The prosecutor also emphasized defendant's comments to the arresting officer.

The jury convicted defendant on all counts, and the trial court placed defendant on probation for five years. This appeal followed.

DISCUSSION

I

Evidence of Domestic Violence

During the cross-examination of E.T., defendant's ex-wife, the prosecutor asked a lengthy series of questions related to

acts of abuse committed by defendant. On appeal, defendant challenges the admissibility of this evidence. He contends that this evidence should have been excluded or, at the very least, that the jury should have been given a limiting instruction explaining how this evidence could be used. Alternatively, he contends his attorney was ineffective in failing to move for exclusion of this evidence or in failing to request a limiting instruction. None of these claims has merit.

As already noted, defendant and E.T. continued to live together and have a romantic relationship after their divorce. E.T. testified at trial that she never saw defendant use, possess or sell methamphetamine, and she added that defendant did not have the money to buy drugs in this quantity. She testified defendant was on his way to help her with a medical emergency when he was stopped by the police.

During cross-examination, the prosecutor questioned E.T. about her continuing relationship with defendant. E.T. admitted she had not previously mentioned the medical emergency scenario to anyone, including defendant's attorney. E.T. stated she was not afraid of defendant. The prosecutor asked E.T. about several incidents in which defendant physically assaulted E.T.

During a break in the proceedings, defense counsel commented: "I just want to put something on the record, an agreement that the DA and I have talked about. [¶] Understandably, she's impeaching [E.T.] with the relationship and any kind of violence extended toward her by [defendant]. But I was going to make a motion to limit the rest

of it somewhat so that it's not cumulative or overly prejudicial. [¶] [The prosecutor] has agreed that there are a couple of other incidents. And she's agreed she's not going to go line by line through them, but is going to be more general about them rather than the detail that she's gone through with this particular case."

After some additional questioning by the prosecutor, E.T. stated again that she was not afraid of defendant. During redirect testimony, E.T. emphasized that she would not lie to protect defendant, and she recognized that her testimony in court would hurt defendant's upcoming case on domestic violence charges. She noted that she would be going home from court that evening with defendant, and added that if she were afraid of defendant, she would not have given this testimony.

During discussions about instructions, the prosecutor stated she was withdrawing her request for CALCRIM No. 303, which provides: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." The prosecutor stated this instruction was unnecessary because nothing had been admitted for a limited purpose.

Defense counsel responded, "I think the evidence regarding the domestic violence was basically for her credibility and not for any other reason." The prosecutor disagreed, noting that no motion was made during the witness's testimony to limit the applicability of this evidence. She added: "And it's not just for that; it's for bias, interest and motive, which is a major

part of judging witness credibility." The court agreed that the evidence was not limited, and defense counsel withdrew her objection.

Despite this colloquy, the court in fact read CALCRIM No. 303 to the jury.

Defendant now contends that evidence relating to the prior incidents of domestic violence should have been excluded from evidence. However, defendant also recognizes that the failure to raise this issue in the trial court forfeits any claim of error. (See Evid. Code, § 353.) He therefore suggests that his attorney was ineffective in failing to make such a motion. We disagree.

"To establish constitutionally inadequate representation, a defendant must show that (1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's representation subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1057-1058.)

Defendant suggests his attorney should have moved to exclude evidence of domestic violence because it was not relevant to any contested issues in the case. Defendant notes that Evidence Code section 210 "defines relevant evidence as 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the action." However, he fails

to recognize that this statutory definition expressly applies to all evidence, "including evidence relevant to the credibility of a witness." (Evid. Code, § 210.) That is precisely the situation here.

E.T. lived with defendant despite their divorce. At trial, she testified in defendant's defense, describing events that she had never mentioned before. Defendant was out on bail, and after testifying, E.T. would be returning home with him. Although E.T. denied being afraid of defendant, evidence of domestic violence was relevant under these circumstances to assess E.T.'s credibility as a witness.

And because this evidence was relevant, defense counsel cannot be faulted for failing to object to its admission.

Defendant asserts that the court erred in failing to give a limiting instruction expressly informing the jury that evidence of domestic violence could be considered only when weighing E.T.'s possible bias. Alternatively, he asserts counsel was ineffective in failing to request such an instruction. Neither claim has merit.

Evidence Code section 355 requires the court to give appropriate limiting instructions if properly requested. (See also *People v. Dennis* (1998) 17 Cal.4th 468, 533.) The only limiting instruction discussed or requested by the parties was CALCRIM No. 303, which states simply: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and no other." Despite initially indicating that it would not give this

instruction, the court in fact included CALCRIM No. 303 in its charge to the jury. Defendant did not request a more specific limiting instruction, and the trial court was under no obligation to provide one sua sponte. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1316.)

Defendant contends that his attorney was ineffective in failing to request an instruction specifically stating that the evidence of abuse was to be considered "only as to [E.T.]'s possible bias in testifying." But this evidence was relevant to her credibility primarily because it suggested to the jury that E.T.'s testimony was not the truth but was, instead, the product of intimidation. (See Evid. Code, § 780, subd. (f).) While we suppose that witness intimidation can result in "biased" testimony, defendant's attorney would have had to more properly ask that the court advise the jury that the evidence of abuse was relevant only to the issue of witness intimidation. We cannot fault counsel for opting not to remind the jury of that testimony any more than necessary.

In any event, as our recitation of the facts makes clear, the evidence of defendant's guilt was strong, and the jury took little time in reaching its verdicts. Under these circumstances, the failure to request a limiting instruction did not prejudice defendant. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

II

Challenge to CALCRIM Instructions

Defendant contends that three of the given CALCRIM jury instructions misstate the law. We disagree.

In reviewing instructions alleged to be erroneous, "'we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' [Citation.] In conducting this inquiry, we are mindful that '"a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."' [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 957.)

With this standard in mind, we turn to each of the challenged instructions.

A. CALCRIM No. 103 (Reasonable Doubt)

CALCRIM No. 103 is the instruction that explains reasonable doubt. Defendant's challenge focuses on one portion of the instruction, in which the jury was told: "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime or brought to trial."

Defendant notes that although this instruction warns the jury of three impermissible bases of prejudice (that he had been arrested, that he had been charged with a crime, and that he had been brought to trial), it mentions only one of these (that he

had been charged with a crime) as something that cannot be considered as evidence. Defendant asserts that "[t]he most reasonable interpretation for the average juror is that there must be a reason for the difference: that the jury could consider as evidence that [defendant] had been arrested, and had been brought to trial."

We agree with the People that this interpretation "defies common sense." A juror hearing this instruction could not reasonably conclude that although the juror could not be biased against defendant because he had been arrested or brought to trial, she could nonetheless consider those facts as evidence of guilt. Defendant's view is not only implausible, but it ignores other instructions that were given, including CALCRIM No. 104, which informed the jury that it "must use only the evidence that was presented in this courtroom. Evidence is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence." The court did not at any time instruct the jury that it could consider the fact of defendant's arrest or trial as evidence of his guilt; defendant's suggestion to the contrary is unsupported by the record.

In short, CALCRIM No. 103 did not misstate the law, and we reject defendant's claim of error.

B. CALCRIM No. 302 (Evaluating Conflicting Evidence)

Defendant contends that the court's instruction under CALCRIM No. 302 conveyed the erroneous impression that a jury

may consider the number of witnesses who testified for each side as a factor in determining which version of events to credit. We find that the challenged instruction accurately states the law.

CALCRIM No. 302 provides: "If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. [¶] On the other hand, do not disregard the testimony of the greater number of witnesses, or any witness, without a reason or because of prejudice or a desire to favor one side or the other. [¶] What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point."

Defendant notes that the CALJIC instruction on weighing conflicting testimony, CALJIC No. 2.22, was approved by the Supreme Court in *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884. He asserts that CALCRIM No. 302 differs in one critical respect from this approved instruction by implying that "the simple number of witnesses is one factor (although not necessarily the determinative factor) in deciding which of two conflicting versions of the facts to credit." This implication, according to defendant, does not reflect California law. We disagree.

CALJIC No. 2.22 offers precisely the same guidance for weighing conflicting testimony by providing: "You are not

required to decide any issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which you may find more convincing. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses [who have testified on the opposing sides]. The final test is not in the [relative] number of witnesses, but in the convincing force of the evidence."

Both instructions (CALCRIM Nos. 302 and 2.22) emphasize that it is the convincing force of testimony, not the number of witnesses that is of critical importance. Neither instruction, however, suggests that the number of witnesses cannot be taken into account. Rather, they both instruct that the number of witnesses, *by itself*, is not the determining factor.

Defendant's claim is again without merit.

C. CALCRIM No. 359 (Corpus Delicti)

Defendant contends that CALCRIM No. 359 does not accurately explain the law on corpus delicti. We disagree.

The trial court's instruction on CALCRIM No. 359 provided: "The defendant may not be convicted of any crime based on his out-of-court statement alone. *Unless you conclude that other evidence shows someone committed the charged crime, you may not rely on any out-of-court statement by the defendant to convict*

him. [¶] The other evidence may be slight and need only be enough to support a reasonable inference that someone's criminal conduct caused an injury, loss, or harm. The other evidence did not have to prove beyond a reasonable doubt that the charged crime actually was committed. The identity of the person who committed the crime may be proved by the defendant's statement alone. [¶] You may not convict the defendant unless the people have proved his guilt beyond a reasonable doubt." (Italics added.)

Defendant contends that the italicized sentence is an incorrect statement of law and that the instruction should instead have explained that the jury may not consider an out-of-court statement "unless there is independent (although slight) evidence on <u>each element</u> of the charged crime." Defendant posits a distinction without a difference.

Under CALCRIM No. 359, a jury may not consider a defendant's out-of-court statement unless the jury concludes that "other evidence shows that the charged crime [or a lesser included offense] was committed." A crime consists of specified elements; if evidence of any of the requisite elements is lacking, a defendant has not committed a crime. There is no difference between an instruction that cautions that there must be evidence on each element of the charged crime and one that cautions that there must be evidence that a crime was committed. These phrases describe the same set of requirements. There was no error.

III

Amount of Fine

Vehicle Code section 14601.1 authorizes a fine from $300 to $1,000 upon conviction for driving with a suspended license. The probation report prepared for defendant's sentencing hearing recommended "a suitable fine ($300.00 to $1,000.00)." According to the reporter's transcript from this hearing, the court ordered a fine of $2,300.

Defendant contends that the judgment must be corrected by striking this unauthorized fine and imposing the minimum fine of $300. The clerk's transcript demonstrates that no correction is necessary.

We agree with defendant that the reference to a fine of $2,300 in the reporter's transcript reflects an unauthorized amount. However, the minute order reflects that the trial court ordered a fine of $300, the minimum authorized by Vehicle Code section 14601.1. Under these circumstances, we deem the minute order to prevail over the reporter's transcript. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 768.) No correction is necessary.

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

RAYE, Acting P.J.

ROBIE, J.